Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1372

ANTHONY P. TRAVISONO, et al.,
PETITIONERS,

v.

ANTHONY SOUZA, et al.,
RESPONDENTS.

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

Civil Action No. 5261
ANTHONY SOUZA, et al.
v.
ANTHONY TRAVISONO, et al.

OPINION

PETTINE, *Chief Judge.*

This is a civil action filed on behalf of the inmates confined at the Adult Correctional Institutions (hereinafter "ACI") against various state officials and correctional officers seeking declaratory and injunctive relief. Specifically, the plaintiffs allege that they had been denied the right of access to counsel and the right to attorney-client confidential communication in violation of First, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. The cause of action arose under 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202. Jurisdiction is based upon 28 U.S.C. § 1343. Counsel for the plaintiffs now petition the Court for costs and attorneys fees.

Travel of the Case

In November 1971, an Inmate Legal Assistance Program (hereinafter "ILAP") was instituted at the Adult Correctional Institutions under the auspices of the Rhode Island Governor's Committee on Crime, Delinquency and Criminal Administration and was administered pursuant to a sub-contract by the Center for Corrections and the Law at Boston College Law School. The program was federally funded and is designed to provide a full panoply of legal services to indigent prisoners. At the time the suit was commended "ILAP" was staffed by a supervising attorney, a staff attorney, an office manager, and a group of law students from the Boston College Law School who

work on a part-time basis assisting the two staff attorneys. On April 2, 1973 a riot occurred at the prison and shortly thereafter, on June 22, 1973, a guard was murdered. In the interim a new warden was appointed and as a result of his policies, the "ILAP" was evicted from its institutional office space, law students were barred from the prison, and the access of attorneys to the prison was curtailed.

On July 27, 1973, this Court issued a preliminary injunction with the consent of all parties after a hearing at which evidence was presented. In substance, the Order granted any attorney the right to consult with an inmate at the "ACI" once he designated the general purpose of his visit. The Order further provided that consultation could reasonably be had between the hours of 8:30 a.m. and 3:30 p.m. with consultations permitted at other times for reasonable cause. Regarding agents and/or experts of attorneys the warden was ordered to make individualized determinations whether they were to be admitted until the Court decided the broader issue of law student access to the prison. The Court also ordered the room being constructed for attorney consultations be completed within two weeks. In the July 27, 1973 decision, this Court expressly reserved decision on the following issues:

(a) whether or not agents or experts in the service of attorneys enjoy the same privilege as attorneys;

(b) whether or not the consultation facilities afford appropriate confidentiality;

(c) whether the room to be provided to attorneys would be adequate for appropriate consultation by the attorney and client;

(d) whether or not the "ILAP" is entitled to the use of an office in the administration section of the maximum security building.

On December 18, 1973[1] this Court in its decision on the reserved issues held that an inmate has a constitutional right to reasonable access to the courts and that for that right to have any meaning inmates must also have the right to access to "qualitatively competent legal assistance, reasonably available and capable of responding to the needs for the prison population." In the instant action the Court found that the use of law students by the "ILAP" was essential for the satisfaction of those rights and held that the state could not condition operation of the program so as to effectively impair these constitutional rights by summarily barring law students from the prison. Additionally, the Court held, "In circumstances in which a prisoner's Sixth Amendment right to counsel is involved, not only must an attorney be given the broadest possible opportunity to meet and confer with his inmate client but the same right as of necessity filters down to his paralegal assistants." 368 F. Supp. at 970. In the second portion of the decision this Court held that the state may not limit attorney access to attorneys of record and directed the state to permit attorneys access to inmates, "in any and all situations serving a legitimate legal or legally related issue which may either directly or indirectly involve that inmate". 368 F. Supp. at 971. Finally, this Court held that the consultation facility for attorneys to meet with their inmates were "of such limited capacity as to infringe on the inmate's right to counsel and court access," *Id.* at 972, and ordered the necessary remedial action.

On appeal the First Circuit affirmed to the extent that the district court opinion is governed by *Procunier* v. *Martinez*, —— U.S. ——, 42 U.S.L.W. 4606 (April 29, 1974).

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[1] 368 F. Supp. 959.

Costs and Attorneys Fees

Federal courts have equitable powers to award attorneys fees in appropriate cases. *Sprague* v. *Ticonic National Bank*, 307 U.S. 161, 166, 59 S. Ct. 777, 83 L. Ed. 1184 (1939). In the absence of statutory or contractual authorization, the court in its exercise of equitable powers may award attorneys fees and costs when the interest of justice so requires. *Hall* v. *Cole*, 412 U.S. 1, 93 S. Ct. 1943, 36 L.Ed. 2d. 702 (1973); *Mills* v. *Electric Auto-Lite*, 396 U.S. 375, 90 S. Ct. 616, 24 L.Ed. 2d. 593 (1970). Therefore, this Court must decide whether this is an appropriate case for the award of costs and attorneys fees. I conclude that it is.

While the general American rule is that attorneys fees are not ordinarily recoverable as costs, several judicially developed exceptions to this rule have developed. *Natural Resources Defense Council, Inc.* v. *E.P.A.*, 484 F.2d 1331 (1st Cir. 1973). The First Circuit has recently reiterated its position that in cases where a significant public interest has been forwarded by the suit, the Court may award attorneys fees. *Hoitt* v. *Vitek*, 495 F.2d 219 (1st Cir. 1974). Earlier, in *Natural Resources Defense Council, Inc.* v. *E.P.A.*, *supra*, the court stated:

> "Recently the notion of spreading the litigation costs equitably among all the beneficiaries has been coupled with that of encouraging suits which promote the public interest. *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S. Ct. 964, 19 L.Ed.2d. 1263 (1963); *Lee* v. *Southern Home Sites Corp.*, 444 F.2d 143 (5th Cir. 1971); *LaRaza Unida* v. *Volpe*, 57 F.R.D. 94 (N.D. Cal. 1972); *Sims* v. *Amos*, 340 F. Supp. 691 (M.D. Ala. 1972). When private litigation vindicates a significant public policy and at the same time, creates a wide-spread benefit, policy today favors awarding attorneys fees against a party who exists to serve or represent the interest of all those benefitted." 484 F.2d at 1333.[2]

The present case falls clearly within the scope of this exception. The benefit accruing to the plaintiff class from this action cannot be overemphasized. Fundamental rights going to the heart of the integrity of the American system of justice have been vindicated. There can be no question that congressional policies strongly favor the vindication of federal constitutional rights violated under the color of state law, 42 U.S.C. § 1983. Moreover, through experience this Court has learned that often the action of private attorneys willing to devote their time and highly refined skills is absolutely essential for the protection of the constitutional rights of prisoners. The private bar should be encouraged to undertake such difficult and time-consuming litigation. Therefore, an award of attorneys fees to the three private attorneys who represented the plaintiffs in this action is appropriate.[3]

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[2] Indeed, in *Sims* v. *Amos*, *supra* at p. 694, the proposition was stated even more strongly:

> "In instituting the case sub judice, plaintiffs have served in the capacity of 'private attorneys general' seeking to enforce the rights of the class they represent. (Citations omitted) If, pursuant to this action plaintiffs have benefitted their class and have effectuated a strong congressional policy, they are entitled to attorneys' fees regardless of defendant's good or bad faith. (Citation omitted) Indeed, under such circumstances, the award loses much of its discretionary character and becomes a part of the effective remedy a court should fashion to encourage public-minded suits . . . , and to carry out congressional policy. (Citation omitted)" at p. 694.

[3] The defendant contends that under the Eleventh Amendment to the U. S. Constitution this Court lacks jurisdiction to award attorneys' fees. However, the defendant cites no cases in support of its position. The First Circuit in *Hoitt* v. *Vitek*, *supra*, recently granted attorneys' fees in another 42 U.S.C. sec. 1983 action against the warden of a state prison and in *Natural Resources Defense Council, Inc.* v. *E.P.A.* the First Circuit took note of the solvent immunity problem and stated:

Left to be determined is the reasonableness of the amount requested by counsel. The fixed costs incurred by Mr. Gonnella and Mr. Stein are undisputed and unchallenged and are therefore granted. As attorneys fees each attorney seeks to be compensated at the rate of $60 per hour and has submitted the affidavit of Mr. Milton Stanzler, a well-known local attorney of recognized stature who is thoroughly familiar with the complexities of civil rights litigation who states that he believes the requested hourly rate is reasonable for litigation of this nature.[4] Accordingly, Attorney Gonnella has submitted an affidavit stating that he expended 189 hours on this case and seeks $11,340 in attorneys fees. Attorney Stein has submitted an affidavit

"[C]ourts have often awarded fees against state agencies or officials. *Ojada* v. *Hackney*, 452 F.2d 947 (5th Cir. 1972); *Taylor* v. *Perini*, 359 F. Supp. 1185 (N.D. Ohio 1973) (civil rights); *LaRaza Unida* v. *Volpe*, 57 F.R.D. 94, 101-102 n. 11 (N.D. Cal. 1972) (environmental protection); *Sims* v. *Amos*, 340 F. Supp. 691, 694 n. 8 (N.D. Ala. 1972) (reapportionment); *NAACP* v. *Allen*, 340 F. Supp. 703, 708, 710 n. 10 (M.D. Ala. 1972) (desegregation)." at pp. 1333-1334.

While one could argue that the Supreme Court's recent Eleventh Amendment decision in *Edelman* v. *Jordan*, 42 U.S.L.W. 4419 (March 25, 1974) concerning a court order directing the state to pay welfare benefits retroactively greatly expands the strength of the Eleventh Amendment, I do not conclude that this decision affects the power of the court to award attorneys' fees. Initially, I note that the First Circuit in *Hoitt* v. *Vitek*, *supra*, issued after the decision in *Edelman*, felt unemcumbered by the Eleventh Amendment in approving the grant of attorneys' fees in a not dissimilar situation. Second, I find the reasoning adopted first in *Sims* v. *Amos*, *supra*, persuasive. The Court wrote:

> "Individuals who, as officers of a state are clothed with some duty with regard to a law of the state which contravenes the constitution of the U. S., may be restrained by injunction and in such a case the state has no power to impart to its officers any immunity from such injunctions or from its consequences including the court costs incident thereto." n. 8.

Therefore, the Court did not find solvent immunity a bar to the award of attorneys' fees. *Taylor* v. *Perini*, *supra*, *LaRaza Unida* v. *Volpe*, *supra*, *Natural Resources Defense Council, Inc.* v. *E.P.A.*, *supra*.

[4] The counsel for the plaintiff submitted the affidavit of another prominent attorney whose suggested hourly rate was $75.

stating that he spent 29.6 hours on this action and seeks $1,776 in attorneys fees. Finally, Attorney Angelone in his affidavits states that he expended 34 hours on this matter and seeks $2,040 in attorneys fees. The defendant has submitted no affidavits in opposition to the plaintiff's figures but simply argues in his memorandum that a more experienced attorney could have done the work in this case in appreciably less time and that the hourly rate cited is too high for such "young men only recently graduated from law school."

The specific amount of attorneys fees to be granted is within the Court's discretion. *Hoitt* v. *Vitek*, *supra*, 6 *Moore's Federal Practice*, § 54.77 [2], p. 1716. In determining the amount the Court may take into account the circumstances surrounding the case, its importance and complexity, and the skill, experience and professional standards of the attorney.

There is no factual basis in the record that these attorneys are "young men only recently from law school". Their work in this case belies this fact. Their court performance and briefs were of high caliber not to be demeaned because of their age. I found them skilled, well prepared and obviously experienced in prison litigation. The quality and comprehensiveness of their work was of unquestioned assistance to this Court.

The State has not seen fit to question the hours expended by counsel and I, therefore, accept the same as reasonable for this type of litigation. I also accept the undisputed affidavit of Mr. Stanzler and accordingly the fees as requested are hereby granted.

An Order will be prepared accordingly.

By Order

(s) ILLEGIBLE

Clerk

ENTER:

(s) RAYMOND J. PETTINE

Chief Judge

July 8, 1974